No. 341.

Br. of Brown for Def.

Office Supreme Court U.S.
FILED
NOV 7 1902
JAMES H. MCKENNEY, CLERK.

Filed Nov. 7, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 341.

SANFORD JACOBI, *Plaintiff in Error,*

vs.

THE STATE OF ALABAMA, *Defendant in Error.*

Brief and Argument of Charles G. Brown, Attorney-General of Alabama, for Defendant in Error.

31997

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 341.

SANFORD JACOBI, *Plaintiff in Error,*

vs.

THE STATE OF ALABAMA, *Defendant in Error.*

Brief and Argument of Charles G. Brown, Attorney-General of Alabama, for Defendant in Error.

It is deemed proper to state that not until Monday, the 26th inst., was notice received that this case was set for hearing on the 3d of November next; and that the written brief and argument for plaintiff in error in the Supreme Court of the United States has not been furnished counsel for State of Alabama. The counsel for State has been compelled to consider only the brief and argument of counsel for plaintiff in error before the Supreme Court of Alabama, a copy of which was furnished him last Monday. He had not an opportunity to read the brief and argument before the submission of the case to the Supreme Court of Alabama, and the same was not found in the record. These facts and the limited time for preparation rendered it impossible to examine, analyze and discuss the authorities as thoroughly and systematically as the questions involved demand, and the obligations of Attorney to the Court in the presentation of a cause require.

Sanford Jacobi was indicted, tried and convicted of an assault with intent to ravish—a felony punishable by imprisonment in the State penitentiary. On the trial after a sufficient predicate had been laid in accordance with the State decisions, the testimony of the young lady, charged in the indictment to be the victim of such assault, on a former trial of the cause in the same court was according to the settled law of the State admitted in evidence against the objection of the plaintiff in error. The settled doctrine of the courts of Alabama is, that when it is shown to the court that a witness who had testified on a former trial in which the accused had been confronted with such witness, and had cross-examined the witness, or had the opportunity of cross-examination (in this case the fact is undisputed that such cross-examination was made and had on the former trial), and it was shown to the court that there had been diligent search for the witness within the jurisdiction of the court and that she was not present at the trial, and that the witness has gone beyond the jurisdiction of the court permanently, or for such an indefinite period that a return was merely conjectural, the evidence on former trial is admissible.

The contention of the plaintiff in error is that this ruling of the court on the admission of the testimony of this witness on the former trial was violative of the Fourteenth Amendment of the Constitution of the United States, and specially that provision of said amendment, as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law,"—and this is the sole issue in this case which is claimed to present a Federal question entitling plaintiff in error to invoke the jurisdiction of the Supreme Court of the United States to review the decision of the Court of last resort of the State of Alabama.

First.

The State of Alabama insists that on the facts and record in this case that the point is not so presented as this Court will take jurisdiction and review the ruling and decision of the Alabama courts on this question, and that the writ of error should be dismissed.

The record shows that plaintiff in error did not specially set up, or claim in the trial court the right, title, privilege, or protection guaranteed by the Fourteenth Amendment of the Constitution; that the Supreme Court of Alabama did not pass upon, or notice, this question; and that this right, immunity or protection under said amendment was first

presented in an assignment of error in the appellate court of the State. In *Spiers v. Illinois*, 123 U. S., 181, the Court said: "To give us jurisdiction under Section 709 of the Revised Statutes because of the denial of any right, title, privilege, or immunity claimed under the Constitution, or any treaty, or statute of the United States, it must appear on the record that such right, title, privilege or immunity was "*specially set up or claimed.*" (Italics are the Court.s') As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. if the right was not thus set up and claimed in the court below, the judgment of the highest court of the State is conclusive upon us."

The rule stated as to the Supreme Court of Illinois is the law governing the Supreme Court of Alabama—its jurisdiction in such cases is appellate,—solely to review errors in the rulings of the court below, and such questions must be specially reserved by proper exception in the trial court. It must be also borne in mind that the Constitution of the State of Alabama in force at the time of the trial and all preceding Constitutions of the State and the Revised Constitution lately adopted contain in nearly identical language the ~~provision of the~~ Sixth Amendment of the Federal Constitution as to confrontation of accused with witnesses against him, and of the Fourteenth Amendment as to "due process of law." The protection of the Fourteenth Amendment was not claimed in the trial court, and the objection made, clearly had reference to the Constitution of the State solely. Certainly the record fails to show that the right, title, or protection under the Fourteenth Amendment was "specially set up and claimed." The decision in Spiers' case *supra* is quoted and approved in *Baldwin v. Kansas*, 129 U. S. 56-57.

In *Davis v. Texas*, 139 U. S. 657, the Court said: "A writ of error to review the judgment of the highest tribunal of a State stands on a far different ground (from a direct appeal from the Supreme Court of a Territory), and cannot be maintained in the absence of a Federal question giving us jurisdiction. The State court rendered no decision in favor of the validity of a statute of or authority exercised under the State, drawn in question on ground of repugnance to the Constitution, or laws, of the United States, nor was any title, right or immunity under such Constitution of the United States, or statute, specially set up, or claimed in the case. It is not within our province to pass upon any of the questions sought to be presented as

they fall entirely within the scope of the powers of the State."

The trial court was passing upon a law, or Constitutional provision of the State, and not the Fourteenth Amendment, and the Supreme Court went no further. The question properly before the Alabama courts was the admissibility of the testimony under a valid, unquestioned Constitutional provision of the State Constitution,—and the validity of the Constitutional provision was not denied, but upheld, and that the testimony was held admissible under such provisions—no statute or provision of the Constitution of the United States was specially drawn in question, nor any law of the State held to be valid which was in conflict with the Constitution of the United States.

Central Land Co. v. Laidley, 159 U. S. 109.

Second.

It has been decided since the adoption of the Fourteenth Amendment that the first eight amendments of the Constitution of the United States do not apply to the States, and that the clause of the Fourteenth Amendment as to "due process of law" does not in and of itself make these amendments apply to the States, and that such amendments are self-executing as to the States. The objection that proceeding by information does not amount to due process of law, and that the Fourteenth Amendment made this provision of the Fifth Amendment binding on the States has been overruled in *Hurtado v. California*, 110 U. S. 516; and this has been approved and re-affirmed in numerous subsequent decisions.

Hallinger v. Davis, 146 U. S. 314-322;
McNully v. California, 149 U. S. 645;
Hodgson v. Vermont, 168 U. S. 262, 272;
Holden v. Hardy, 169 U. S. 366-384;
Brown v. New Jersey, 175 U. S. 172-176;
Bolln v. Nebraska, 176 U. S. 83.

The same doctrine is announced in *Hallinger v. Davis*, 146 U. S. 314, as to provisions of the Sixth Amendment for trial by an impartial jury—a common law jury of twelve men. In this Sixth Amendment is the clause as to confrontation with witnesses against the accused. This case and other cases bearing on this question are reviewed in *Holden v. Hardy*, 169 U. S. 385, and in *Maxwell v. Dow*, 176 U. S. 584, and the doctrine announced that the rules of the common law have been modified and made to conform to the

public welfare, the dictates of common sense, the necessities of the case, and the practical administration and execution of the law. The Seventh Amendment giving the right in suits at common law where the value in controversy shall exceed twenty dollars to a trial by jury, it was held in *Walker v. Sauvinit*, 92 U. S. 90, that under the Fourteenth Amendment this provision was not applicable to or binding on the States.

In *Maxwell v. Dow*, *supra*, in an exhaustive and learned discussion of this question it was distinctly decided that under the "due process of law" clause of the Fourteenth Amendment, the Fifth and Sixth Amendments were not applicable to or binding on the States, and that under the privilege and immunities clause thereof the same doctrine was announced—and on pages 595 and 596 the court said: "This case shows that the Fourteenth Amendment in forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a State court, although the right to such a trial in Federal courts is specially secured i nthe cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are these privileges or immunities, granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of these privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers or extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen."

Third.

What is meant by and what is the definition of due pro-

cess of law within the purview of the Fourteenth Amendment and its extent and limitation as affecting the power of the States in its legislative, executive and judicial action and as affecting and limiting the jurisdiction and power of the Supreme Court to review the decision of the State courts? The defendant in error will content itself by citations of the following cases—confidently insisting that these citations will demonstrate that there is no Federal question involved in the case at bar and that there has not been in letter or spirit a violation of this amendment to the Constitution of the United States, and that the "requirements of the Fourteenth Amendment have been fully satisfied" by the rulings and decisions of the Alabama courts in this case.

1. Law in its regular course of administration is due process of law and when secured by the law of the State the Constitutional requirement is satisfied.

Iowa Central R. R. Co. v. Iowa, 160 U. S. 390;
Leeper v. Texas, 139 U. S. 462-468.

2. "That by the Fourteenth Amendment the power of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or class of persons, of equal and impartial justice, under the law, that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the Constitutional requirement is satisfied; and that due process is so *secured by laws operating on all alike*, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

Leeper v. Texas, 129 U. S. 467-468.

3. Equal protection of a law is not denied by a law, or course of procedure, which would have been applied to any other person in the State under similar circumstances and conditions.

Tinsley v. Anderson, 171 U. S. 101.

4. Wherever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied.

Walston v. Nevin, 128 U. S. 578.

5. Due process of law within the meaning of the Fourteenth Amendment is secured, if the law operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government.

Giozza v. Turnan, 148 U. S. 657.

6. In *Minder v. Georgia,* 183 U. S. 562, the court by Chief Justice FULLER delivering the opinion, reaffirms the doctrine announced in *Giozza v. Turnan,* 148 U. S. 657, and applies the same to a criminal case in which capital punishment was inflicted, in the following language: "The requirements of the Fourteenth Amendment are satisfied if the trial *is had according to the settled course of judicial procedure* obtaining in the *particular* State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government."

7. *In re Converse,* 137 U. S. 624, the Court say: "But the State cannot be deemed guilty of violating the Constitutional provision against depriving an individual of his life or liberty without due process of law, because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision," (namely, the Fourteenth Amendment of the constitution of the United States) and the court gives as the reason: "Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

We repeat, as has been often said before, that the Fourteenth Amendment undoubtedly forbids an arbitrary deprivatio n of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan (and in the case at bar the Supreme Court of Alabama) did not exceed its jurisdiction or de-

liver a judgment abridging appellant's privileges, or immunities, or depriving him of the law of the land of his domicil."

In re Converse, supra, 631-632.

And to the same effect is the decision in the case of *Central Land Co. v. Laidley*, 159 U. S. 112, as follows: "When the parties have been fully heard in the regular course of judicial proceedings an erroneous decision of a State court does not deprive the unsuccessful party of his property, (his life or liberty) without due process of law within the Fourteenth Amendment of the Constitution." See also:

Walker v. Sauvinit, supra, and cases cited under second head of this brief.

It is submitted that at the time of the adoption of the Fourteenth Amendment, and assuredly at the date of the decision in this case, that the weight of the authority in the United States sustains the doctrine announced by the Supreme Court of Alabama in the case of *Lowe v. State*, 86 Ala. 47, and reaffirmed time and again in numerous subsequent cases and in the case at bar.

In Greenleaf on Evidence, (16th ed.) § 163 (g) p. 284, the text is as follows: "The death of the witness has always, and as of course, been considered as sufficient to allow the use of his former testimony. The absence of the witness from the jurisdiction, out of reach, of the court's process ought also to be sufficient, and is so held by a majority of the courts; mere absence, however, may not be sufficient, and it is usually said that a residence, or an absence, for a prolonged, or uncertain time, is necessary. A few courts do not recognize at all this cause for non-production. A few others deny it for criminal cases"; and the doctrine announced is sustained by numerous cases cited in note 2 to this section.

On the question as to right of defendant in a criminal case "to be confronted with the witnesses against him," this best, most accurate and profound and philosophical text book on evidence announces this doctrine—and sustains it by the clearest and soundest reasoning and the purest "logic of the law." "The chief purpose of the confrontation is to secure the opportunity for cross-examination; this has been repeatedly pointed out in judicial opinions; so that if the opportunity of cross-examination has been secured, the function and test of confrontation is also accomplished—confrontation being merely the dramatic preliminary to cross-examination. The second and minor purpose is that

the tribunal may have before it the deportment and appearance of witness while testifying But the latter purpose is so much a subordinate and incidental one that no vital importance is attached to it, consequently, if it cannot be had, it is dispensed with, provided the chief purpose, cross-examination, has been attained."

1 Greenleaf on Evidence, § 163 (f).

"But it is true under the Constitutional sanction for confrontation in criminal cases, that confrontation if it can not now be had on the final trial may be dispensed with. The Federal Constitution and those of the most of the States provide that the accused is entitled "to be confronted with the witnesses against him." The argument has often been made that this provision excludes all testimony not delivered *viva voce* at the *time* of the trial in question. This argument, though wholly unsound, has in a few instances been sanctioned by the courts with the effect of excluding depositions and testimony at former trial; but it is usually and properly repudiated, not only for depositions and testimony on former trials, but also for other testimonitl assertions receivable by way of exceptions to the Hearsay rule, such as dying declarations, reputations, official certificates, and the like. But it is desirable to appreciate the true reason for repudiating the argument. It has sometimes been said, in doing so, that the witness who reports the former testimony, etc., is, in fact, brought face to face with the accused and hence the rule is satisfied. But this is fallacious; the deceased deponent or former witness or dying declarant is equally a witness, though speaking extra-judicially, and as to him the accused is not now confronted. The real answer is a different one. First, the main object of confrontation—to secure the opportunity of cross-examination, as above explained, *has, in fact*, been accomplished; at the taking of the deposition or at the former trial, the accused had the power of cross-examination; and that is what the Constitution entitles him to; in short, he has had the promised confrontation. Secondly, the Constitutional clause purported merely to adopt the general principle of the Hearsay rule, that there must be confrontation, *i. e.*, the power of confrontation, for infra-judicial witnesses; but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well established exceptions and there might be others in the future; the Constitution endorsed the general principle subject to these exceptions; merely naming and describing it sufficiently to indicate the principle intended,—just as the brief constitutional sanction for trial by jury did not attempt to enumerate the class of

cases to which that form of trial was appropriate, nor the precise procedure involved in it, and has always been construed as not absolute and universal in effect, but as subject to the limitations and unessential variations understood to accompany that institution. Thirdly (perhaps only as another aspect of the preceding reason), the constitutional requirement is limited to the mode of taking testimony at the trial; it does not prescribe what kinds of testimony shall be given infra-judicially, but only what mode of procedure —*i. e.*, not a secret or *ex parte* examination—shall be followed for such testimony as by the ordinary and existing law of evidence is required to be given infra-judicially. Such is the better reasoning accepted by most courts as here applicable. It follows that the Constitutional requirement of confrontation is not violated by dispensing with the actual presence of the witness at the trial, if he has already been subject to cross-examination; or if his assertions are received under some recognized exception to the Hearsay rule.

The general principle, therefore, should be that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again, he should dispense from doing so, if there is at hand his testimony already subjected to cross-examination; and this general notion underlies all the cases of dispensation. But it is not rationally and consistently applied. As a matter of precedent, it is therefore necessary to examine the specific ways in which a witness' presence may become impossible; and, furthermore, the precedents often differ (though they should not) according as the cross-examined testimony is offered in the shape of testimony at a former trial (including inquests and preliminary examinations) or of a deposition."

1 Greenleaf on Evidence, 282-284.

And then follows the quotation given above in the discussion of the law as to admissibility of testimony on former trial of witness beyond the jurisdiction of the court.

The nature and duration of witness' absence from the State,—"his being without the jurisdiction of the court,"—the conservative limitations thereof, and the reasons and authorities for the doctrine are ably and fully and, in our judgment, convincingly shown in the following decisions of the Supreme Court of Alabama:

Marler v. State, 67 Ala. 55;
Lowe v. State, 86 Ala. 47;
Perry v. State, 87 Ala. 30;
Pruitt v. State, 92 Ala. 42;

Harris v. State, 73 Ala. 495;
Lowery v. State, 98 Ala. 45;
Burton v. State, 107 Ala. 68;
Burton v. State, 115 Ala. 10;
Mitchell v. State, 114 Ala. 34;
Lett v. State, 121 Ala. 65.

And it is confidently submitted that these decisions, the reasoning of the court, and the authorities cited, both English and American, overwhelmingly sustain the contention of the State of Alabama in the case at bar, and upon reason, authority and precedent the doctrine does not violate the principles of Magna Charta, the common law or the right of the accused "to be confronted with the witnesses against him."

The narrowness and insufficiency of the argument of the learned and painstaking counsel for plaintiff in error is clearly shown by his labored effort to confine the determination of this question to certain English decisions as being the sole authentic expositors of the common law; and that the Fourteenth Amendment was adopted solely with reference to these English common law decisions, and that these said decisions alone on this question were incorporated in and become a part of this amendment. It is earnestly insisted that the decisions of the courts of the several States of this Union—of this foremost Republic of the world—where the great principles of Magna Charta and of the common law applicable to the spirit of our government and institutions, are most thoroughly understood, practiced and enforced,—are at least of as high character and of as binding force as those of the English courts considered as expositions of these great principles. An examination of the decisions of the several States of this Union,as stated in Greenleaf on Evidence, *supra*, will demonstrate that in a majority of the decisions in the States of this Union the doctrine, at the time of the adoption of this amendment, was contrary to these English common law decisions and in harmony with the decisions of the courts of the State of Alabama. It is more probable, logical and correct to affirm that this amendmenet was enacted by Congress and adopted by the law-making powers of the several States with reference to law as adjudicated in the different courts of the States of this Union, rather than to the old decisions of the Mother country. The argument is most fallacious that in the year 1868,—the time of the adoption of this amendment,—the Congress of the United States, the respective Legislatures of the several States, the Federal and State courts, looked solely to these decisions of the courts of Eng-

land, and disregarded the decisions of the courts of the States of this great Union, as the only correct expositions of the principles of Magna Charta and of the common law in the solution of the questions of the constitutionality of the law of the State of Alabama, and of a majority of the States of this Union, as enunciated by their highest courts as being in conformity to, or violative of, this amendment of the Federal Constitution.

The Supreme Court of the United States has most wisely said in *Holden v. Hardy*, 169 U. S. 386, "that an examination of both these classes under the Fourteenth Amendment will demonstrate that in passing upon the validity of State legislation this court has not failed to recognize the fact that the law is a progressive science." And it is respectfully and confidently submitted by the State of Alabama that the Supreme Court of the United States has not, and will not fail to recognize that the great principles of Magna Charta and of the common law are progressive and expansive and their interpretation and application constitute a progressive science and to the future belongs their full development and growth and maturity.

The counsel for plaintiff in error in his brief and argument before the Supreme Court of Alabama, wherein he collated and reviewed and discussed the decisions of the Supreme Court of the United States as bearing on the question, insists and deduces from these authorities that this court has ruled adversely to the doctrine announced by the Supreme Court of Alabama in this case and in numerous preceding cases. It is most respectively submitted and insisted that the cases in his brief show that the question has not been directly decided by the Supreme Court of the United States, and that the fair and legitimate deduction from the cases rather sustain than repudiate the doctrine of the Alabama court. Most assuredly these decisions hold that the vital constitutional principle and right involved in this case, namely, "the right to be confronted with the witnesses against him,"—is not violated or denied, for the reason that he had been confronted with these witnesses on the former trial and had the all important and paramount right of cross-examination as expressed in 1 Greenleaf on Evidence, *supra*. See *Mattox v. United States*, 156 United States, 241-242; and the court, both in the majority and dissenting opinions, recognizes the doctrine, that even the general rules of the common law have exceptions and must give way to the requirements of public policy and the necessities of the case. And we confidently assert that the doctrine of the Alabama court is a most wise and conservative one, namely: that when it was shown by diligent search of the officers of

the law and other testimony that the witness was without the jurisdiction of the court permanently, or for such an indefinite period of time that her return was conjectural only, and that the paramount right of the defendant as to confrontation and cross-examination has been allowed to the accused, on the former trial, her evidence given in such former trial was properly admissible; and the other minor problematical advantages to the accused, such as her appearance and demeanor on the stand, must yield to exigencies of public policy, the necessities of the case and the due administration of law. The case of *Kirby v. United States* does not bear on the question; nor does the case of *Motes v. United States*. The only question really decided in this latter case was "that when it did not appear that witness was absent by the connivance or procurement; but *did appear that he was absent through negligence of the prosecution*, the testimony of such absent witness on former trial was not admissible." And the court distinctly announced that "we need not decide more in the case."

But however this may be the doctrine of the Alabama court has been the law of that State for decades before the trial of the plaintiff in error and before the adoption of the Fourteenth Amendment. It was the law of the land of the State of Alabama, one of the co-equal States of this government, enunciated by her courts and accepted by her citizens, and every department of her government, Executive, Legislative, and Judicial. There can be no question but that the trial was had according to the long settled law and course of judicial procedure, and that the law operated on all persons alike and did not subject the defendant to the arbitrary exercise of the powers of government. It can not, in our humble opinion, be entertained by this court that he was deprived of his liberty on the trial of this cause without "due process of law." The Fourteenth Amendment was never intended to reach such a case; nor does it arm the Supreme Court of the United States with the jurisdiction and power to arraign the State of Alabama before its tribunal and challenge, review, or annul, the decisions of her courts on this question.

It is, therefore, most respectfully, yet earnestly, insisted that the decision of the Supreme Court of Alabama on this question is in harmony with the weight of authority and sound reasoning, and not in conflict with any decision of the Supreme Court of the United States, and is not violative of the Fourteenth Amendment of the Constitution of the United States, and that this case presents no question which can be reviewed by the Supreme Court of the United States

under the most liberal interpretation of the Fourteenth Amendment as to the jurisdiction and powers of this Supreme Federal Court.

Most respectfully submitted,

CHARLES G. BROWN,

Attorney-General of Alabama, and Counsel for Defendant in Error.

32004